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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

ELIZABETH MORGAN,
Petitioner,

vs.

MILTON C. POTTER, Superintendent of Milwaukee Public Schools of the City of Milwaukee,
Respondent.

No. 607

PETITIONER'S REPLY BRIEF

A. W. RICHTER,
Counsel for Petitioner.

HAMMERSMITH-KORTMEYER CO. MILWAUKEE

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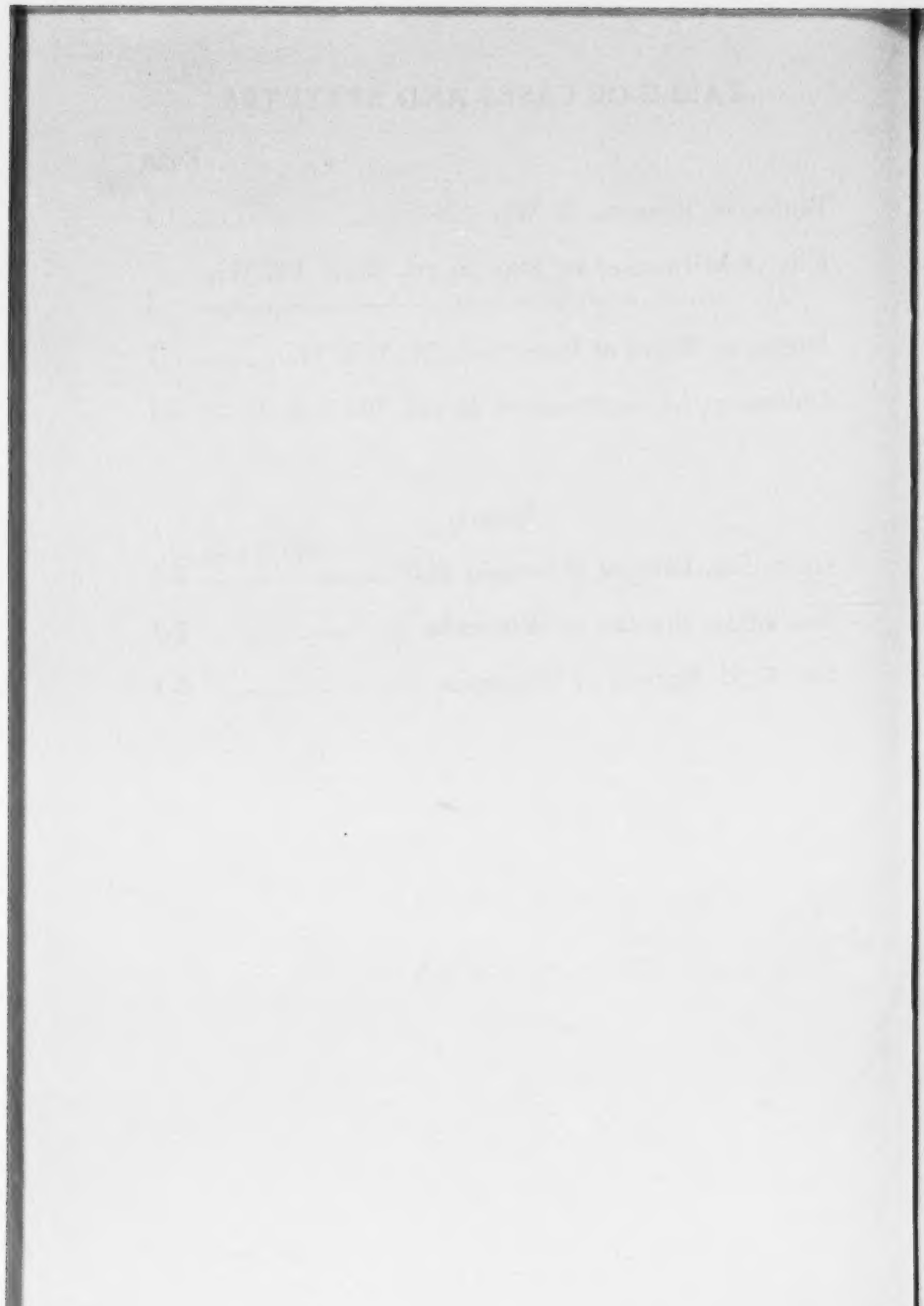

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RESPONDENT'S CONTENTION UNTENABLE

Respondent contends that because no written contracts were made with teachers by the City of Milwaukee, there was no contract.

The doctrine of *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, is not based upon the presence or absence of a written contract. Since 1889, petitioner was employed by the City of Milwaukee, upon an oral contract and so were all other teachers in the City of Milwaukee.

Respondent contends further that there was no contract because the word contract was not used in the legislation, and because it was not necessary for petitioner

to do any act to obtain the rights given her by the tenure statute.

The decision in *Indiana ex rel. Anderson v. Brand* is not based upon mere terminology in the statute. It is based upon the fact that the elements of contract were present and the intent of the legislature to give contractual rights were clear.

The statement that petitioner was not required to do any act to obtain her rights under the tenure law is incorrect. The Teachers Retirement and Tenure Law is Chapter 510 of the Laws of Wisconsin of 1909.

The language of this Act, in paragraph 2 thereof, is:

> "All teachers employed in the public schools of such cities at the time of the organization of said Board, desiring to come under the provisions of this *Act,* shall file a written application therefor and consent thereto with the Superintendent of Schools."

Chapter 510, of the Laws of 1909, became Section 925xx of the Statutes, and the word "Act" was changed to Section. Section 925xx was a single section of the Statutes with a number of sub-sections. It was later changed to Section 42.55 (R. 107 footnote) of the Statutes and appears thus in the present Statutes of Wisconsin. Section 42.55 is also a single section with several subsections. The word "Section" in the place of "Act" was continued in Section 42.55.

It is clear that the word "Act" in Chapter 510 and the word "Section" in 925xx and in 42.55 referred to and was intended to refer to the entire Statute. Clearly, therefore, the statement of the Supreme Court of Wisconsin, (R. 106) as follows:

> "The provision required no act on the part of the plaintiff prerequisite to acquisition of tenure rights as she had taught more than four years when the Act went into effect,"

is erroneous. The original Act provided, as does the present Statute, that petitioner and any teacher:

> "who desires to avail himself of the rights and benefits conferred and to assume the limitations and assessments imposed by this Section shall file a written application therefor and consent thereto."

Therefore, it was necessary for petitioner to voluntarily consent to come under the Act and to assume the obligations imposed by it. These obligations included the agreement to pay monthly contributions into the fund.

The tenure provision was Section 17 of the original Act (R. 106), and became Sub-section 17 of 925xx, and (18) of Section 42.55.

It is submitted that Chapter 510, Laws of 1909, clearly indicated the intent of the legislature to offer a contract to teachers then in the service. The element which was absent in *Dodge v. Board of Education,* 302 U.S. 74, referred to by this Court in *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 107, that is, that the Statute did not bind the teacher to the payment of retirement annuities, was and is present here.

Furthermore, the State of Wisconsin had, through its Supreme Court, announced to teachers and to the world long prior to 1909, that the relationship of the teacher with the governmental subdivision employing it was one of contract.

> *Butler v. Regents,* 32 Wis. 124 (1878).
>
> *City of Milwaukee, Board of Education v. State ex rel. Reed,* 100 Wis. 455 (1898), 76 N.W. 351.

Therefore, it is clearly not true, as respondent argues, (Respondent's Brief 7), that all Milwaukee teachers knew or were charged with the knowledge that the legislature might from time to time enact amendments.

It is also clear that the legislature in enacting Chapter 510 of 1909 had in mind creating contractual rights.

The fact that the teacher was not bound to any particular term of service does not indicate the absence of contract as respondent argues. The offer was held out to teachers then in the service to voluntarily accept Chapter 510 of 1909, including the pension and tenure provisions, and it was agreed by the Act that if they performed by continuing to teach and by paying their monthly contributions, they would have the rights under the Act, including pension and tenure.

Contracts such as that inherent in the Statute are common among private employers. It is not unusual for an employer to offer permanency of tenure and other benefits to an employee provided he shall continue to serve such employer. Certainly, the absence of the additional obligation to continue to serve for a definite period could not destroy such a private contract.

Certainly, an employee who had accepted an offer, such as that contained in Chapter 510 of 1909, and had performed by giving service and making the contributions for fifty years would not be denied relief by any court.

Therefore, the Act of the State of Wisconsin in attempting to abolish without cause petitioner's right to continue in the service is not a mere change of legislative policy as respondent argues, but is nothing other than repudiation of its contractual obligation.

Respectfully submitted,

A. W. RICHTER,
Counsel for Petitioner.